A

KHUTUBUL ZAMAN & ANOR

v.

TJB DEVELOPMENT SDN BHD & ANOR

B

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CIVIL APPEAL NO: 12-35-2003]
11 NOVEMBER 2008

C ***CONTRACT:*** *Sale and purchase of property - Misrepresentation - Failure to build access road as promised - Whether breach of contract - Whether negligent or innocent misrepresentation - Whether damages recoverable*

D ***CONTRACT:*** *Misrepresentation - Sale and purchase of property - Failure to build access road as promised - Whether breach of contract - Whether negligent or innocent misrepresentation - Whether damages recoverable*

E The appellant herein (the 1st defendant in the sessions court) appealed against the decision of the learned sessions judge who allowed the claim by the respondents as plaintiffs for the sum of RM200,000 against the appellant. The facts showed that the respondents purchased two units in an office complex built by the appellant who was the property developer to set up office for the F purposes of their legal practice. It was common knowledge that the area in which the office complex was to be built was in a flood-prone area. The respondents claimed that they were induced into buying the two units by the promise of an access road that would bypass the flood prone area into the building of the office G complex. They were also given a brochure (exh. P6A) that included the proposed access road. It transpired that the appellant did not build the proposed access road as promised and that led to their claim against the appellant for damages.

H **Held (allowing the appeal with costs):**

(1) The respondents' case was founded upon negligent misrepresentation. The learned sessions judge erred when he held that the said representations constituted terms of the I contract and consequently the respondents established a case for breach of contract for which they were entitled to damages in the sum of RM200,000. His finding could not be sustained

having regard to the respondents' pleaded case. The facts were misapprehended and the wrong principles of law applied. On that ground alone, the decision of the learned sessions judge should be set aside. Nevertheless, the hearing of a civil appeal was by way of a re-hearing. An appellate court was at liberty to review the pleadings and the evidence contained in the record of appeal and give any judgment or order which ought to have been given or made by the learned sessions judge. (paras 7, 13 & 14)

(2) Damages that can be claimed under the tort of negligent misrepresentation are for breach of a special duty of care a defendant owes a plaintiff and to compensate the plaintiff for the damages caused in so doing. The special skills of the defendant must be set out in the statement of claim. The defendant must be shown to possess such skills following which he can in law be said to owe a person a duty of care in the conduct of his special skills. It must be pleaded and shown that the defendant knew the plaintiff relied upon his said skills and consequent to the said breach the plaintiff suffered damages and losses. In the present case, the respondents did not plead any special relationship or skills on the part of the appellant to show that the appellant owed a professional duty of care to the respondents. The matters pleaded did not disclose the necessary requirements for a case of negligent misrepresentation and at the most, the respondents succeeded in establishing a case of innocent misrepresentation where damages might be irrecoverable. Based on the principle applied by Gopal Sri Ram JCA in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar*, the respondents were not entitled to the award of RM200,000 as ordered by the learned sessions judge. (paras 15, 16, 17 18 & 19)

Case(s) referred to:

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Metroplex Development Sdn. Bhd. v. Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(foll)***

For the 1st appellant - Gobind Singh Deo (WH Shim with him); M/s Gobind Singh Deo & Co

For the respondents - RK Menon; M/s RK Menon & Co

Reported by Usha Thiagarajah

A

JUDGMENT

Azahar Mohamed J:

[1] This is an appeal by the appellant (the 1st defendant in the Sessions Court) against the decision of the learned sessions judge who had allowed the respondents' claim (the plaintiffs in the sessions court) for the sum of RM200,000 together with the usual interest and costs.

[2] The respondents are both advocates and solicitors of the High Court of Malaya, practicing under the name and style of Messrs. Zaman & Associates. The appellant is a property developer who built and offered for sale office units at office complex known as Menara TJB situated along Jalan Syed Mohd Mufti, Johor Bahru. The respondents said they came to know about the office complex sometime in August 1996. After that they made enquiries as they were desirous of acquiring their own office for the purposes of their legal practice. It was a matter of common knowledge that the area in which the building was to be built was indeed a flood-prone area.

[3] It is the case of the respondents that they had been misled by the appellant. In essence, it is the contention of the respondents that they had been informed that there would be two access roads connecting to the office complex. It was said that one of these roads was to be from Jalan Dato Dalam into the said building. The respondents said they were given a brochure (exh. P6A) which contained drawings which allegedly included the said proposed access road. According to the respondents these representations were most material to them and influenced them into purchasing two units in the said office complex.

[4] Subsequently on 1 October 1996 and 8 October 1996, the respondents signed agreements with the appellant for the purchase of two units at Menara TJB, namely units 12.01 and 12.02. It is the contention of the respondents they were induced into buying the two units by the promise of the access road, that is to say, a road leading from a higher level into the building and therefore bypassing the flood prone area.

[5] On 12 July 1999 the respondents wrote to the appellant complaining about the failure to build the access road as allegedly promised and sought damages of RM201, 985.30 as compensation. The appellant responded refuting making any representations in which it alleged it would build the access road. What follows thereafter, not surprisingly, was that on 15 October 1999 the respondents filed a summons and statement of claim against the appellant.

[6] At this point, I think it is useful to take a closer look at the respondents' amended statement of claim. The relevant paragraphs are as follows:

> 4. Plaintif-Plaintif juga akan menyatakan dan menegaskan bahawa Defendan Pertama telah mengeluarkan dan/atau menyebabkan untuk mengeluarkan kepada orang awam dan juga kepada Plaintif-Plaintif satu risalat dimana Defendan Pertama telah menyampaikan kepada orang awam dan Plaintif-Plaintif mengenai niat, cadangan dan lain-lain mengenai pembinaan lain-lain bangunan tersebut. Plaintif-Plaintif akan pada masa perbicaraan Guaman Sivil ini merujuk kepada risalah untuk penambahan dan implikasi-implikasi penuhnya.
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> 5. Plaintif-Plaintif seterusnya akan menyatakan dan menegaskan bahawa risalah tersebut mengandungi *inter alia* pelbagai representasi-representasi dan lain-lain dan bahawa representasi-representasi dan lain-lain *inter alia* mengandungi misrepresentasi seperti berikut:
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> > (i) bahawa akan terdapat (2) jalan akses menuju ke dan dari bangunan tersebut;
> >
> > (ii) bahawa jalan-jalan akses tarsebut adalah akan dibuat sepanjang Jalan Syed Mohd. Mufti dan satu jalan akan dibina melandai (downhill) dari Jalan Dato' Dalam dan menuju ke dalam bangunan tersebut,
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> 12. Dalam memungkiri representasi-representasi dibuat oleh Defendan Pertama kepada Plaintif-Plaintif dan sepertimana terkandung didalam risalat-risalat tersebut dan juga perjanjian-perjanjian tersebut, Defendan Pertama telah gagal, enggan dan abai dan berterusan untuk gagal, enggan dan abai untuk membina satu jalan akses dari Jalan Dato' Dalam dan menuju ke bangunan tersebut.

13. Plaintif-plaintif juga akan menyatakan dan menegaskan bahawa Defendan Pertama bertanggungjawab (owed) kepada Plaintif satu kewajipan untuk membuat hanya representasi-representasi yang benar dan tepat dan yang rnana mereka boleh sebenarnya memenuhi. Dalam memungkiri kewajipan tersebut, Defendan Pertama adalah bersalah atas kecuaian dalam membuat representasi-representasi tersebut.

Butir-Butir

(ii) menyakinkan/membuat Plaintif-Plaintif percaya bahawa Defendan Pertama akan sebenarnya membina dua (2) jalan akses menuju ke bangunan tersebut;

(iii) membawa Plaintif-Plaintif dalam mempercayai bahawa Defendan Pertama akan sebenarnya membina dua (2) jalan akses menuju ke bangunan tersebut;

(iv) gagal untuk membina satu jalan akses dari Jalan Dato' Dalam menuju ke bangunan tersebut.

14. Plaintif-Plaintif akan seterusnya menyatakan dan menegaskan bahawa sebenarnya ke semua representasi-representasi yang telah dibuat oleh Defendan Pertama berkaitan dengan jalan-jalan akses dari Jalan Dato' Dalam dan menuju ke bangunan tersebut adalah palsu, tidak tepat dan mengelirukan.

15. Plaintif-Plaintif juga akan menyatakan dan menegaskan bahawa dalam keadaan apa yang telah dinyatakan di atas, harga beli yang dituntut oleh Defendan Pertama dan dibayar oleh Plaintif-Plaintif berhubung dengan ruang pejabat tersebut sepatutnya dan seharusnya tidak setinggi seperti yang dibayar iaitu jumlah sebanyak RM425,366 sekaki persegi untuk Unit 1201 dan RM427,329 sekaki persegi untuk Unit 1202 tetapi lebih rendah iaitu kira-kira RM320,296 kaki persegi untuk Unit 1201 dan RM341,869 sekaki persegi untuk Unit 12.02.

16. Dalam akibat dari itu, Plaintif-Plaintif akan menyatakan dan menegaskan bahawa mereka bukan sahaja dikelirukan oleh Defendan Pertama tetapi telah dikenakan bayaran lebihan oleh Defendan Pertama terlanjut kepada kira-kira RM200,000 atau sekitarnya.

[7] Now, a close scrutiny of the above mentioned averments reveals that the case for the respondents is founded upon negligent misrepresentation. It is an important fact to be kept in mind. In spite of this, the learned sessions judge in his grounds of decision said that the said representations constituted terms of the contract

and consequently the respondents had established a case for breach of contracts, for which they were entitled to damages in the sum of RM200,000 (see pages 45-46 of the Record of Appeal). In my view the finding of the learned sessions judge is unsustainable. There was no judicial appreciation by the learned sessions judge of the fact that the respondents' case was as a matter of fact founded upon negligent misrepresentation.

[8] It is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings. The courts are also bound by the pleadings in as much as the parties themselves. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the courts. The courts are not unconstrained to decide on an action on which no issue has been raised by the parties in their respective pleadings. These principles were shown in a number of cases. I would only draw attention to three cases:

[9] First of all is the case of *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42 where Sharma J had this to say:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to factual position then it is hardly open to the court to come to a finding different from such agree facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

It was not open to the learned Magistrate to fly off at a tanget as it were and disregard the pleadings in order to reach a conclusion that the might have thought was just and proper. It was held by Scruton LJ in case of *Baly v. Pollard & Morris*:

> Cases must be decided on the issues on record: and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

[10] This case was followed in our own Court of Appeal in *Haji Mohamed Dom v. Sakiman*, where Sir Charles Mathew CJ said:

> I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.
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> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the court to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law the Constitution and the Government depends to a fairly large extent on the was the machinery of justice functions and it is the duty of those who man that machinery to realize that what they do does not in any was tend to diminish that faith. Everyone is not doubt, liable to make mistake but is would have been better if the learned Magistrate had acted in less haste and had taken a little time to look up the law on the matter.

[11] Also, the decision of our Supreme Court in the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 where it was held that as the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiffs claim be set aside.

[12] And finally, the following passage in the judgment of James Foong J (as His Lordship then was) in *Metroplex Development Sdn. Bhd. v. Makaddas & Anor* [1995] 3 CLJ 70 at p 75:

> The primary function of the statement of claim is to plead reasonable cause of action against the Defendant. Therefore, it must contain all material facts on which the Plaintiff relies for his claim. It must also disclose the legal liability of the Defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the Plaintiff claims or seeks to enforce against the Defendant. Thus, in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must be set out showing the existence of a duty to take reasonable care owed to the

particular person or class of person and that duty was disregarded-see the judgment of Wallis J in *Gantret v. Egerton* [1987] LR 2 CP 371, which was adopted in *West Rand Central Gold Mining Co. v. R* [1905] 2 KB 391. Further, in claims where subjective knowledge of the Defendant is to be implicated such as they 'ought to know' or 'ought to have known', material facts relating to such matters must be pleaded see the case of *Fax v. H Wood (Harrow) Ltd.* [1963] 2 QB 601; [1962] 1 All ER 1100; [1962] 3 WLR 1513.

[13] Returning to the grounds of decision of the learned sessions court in the present case, it is clear that he had erroneously overlooked or failed to take into account the fact that the respondents' pleaded case was one of negligent misrepresentation and unquestionably not one for breach of contract for which judgment was entered in their favour. His finding could not be sustained having regard to the respondents' pleaded case. For this reason, where the facts were misapprehended and the wrong principles of law were applied the decision of the learned sessions judge should be set aside on that ground alone.

[14] Still it is important to bear in mind that hearing of a civil appeal is by way of re-hearing. An appellate court is at liberty to review the pleadings and the evidence contained in the record of appeal. Sitting as an appellate judge now, I can draw conclusions and inferences of fact from the notes of proceedings and give any judgment and make any order which ought to have been given or made by the learned sessions judge.

[15] As stated earlier the respondents' case is founded upon negligent misrepresentation. Now, damages claimable under the tort of negligent misrepresentation are for the breach of a special duty of care a defendant owes to a plaintiff and to compensate the plaintiff for the damages caused in so doing. The special skills of the defendant must be set out in the statement of claim. The defendant must be shown to possess such skills following which he can then in law be said to owe a person a duty of care in the conduct of his special skills. It must be pleaded and shown that the defendant knew the plaintiff relied upon his said skills and consequent to the said breach the plaintiff suffered damages and losses. The authority to support these propositions is to be found in the judgment of Gopal Sri Ram JCA in *Sim Thong Realty Sdn. Bhd. v. Teh Kim Dar* [2003] 3 CLJ 227. There speaking for the Court of Appeal His Lordship said at p 240:

If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co. Ltd v. Heller & Partners* [1964] AC 465. In such a case, the representee must plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence. So far as the relevance of the tort in relation to pre-contractual and contractual statement is concerned, we would quote with approval the following passage from *Sinnadurai on the Law of Contract* (3rd Ed) at p. 243:

Under English Law, until the decision of the House of Lords in decision *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd*, innocent misrepresentation included negligent misrepresentation. However since Hedley Byrne and the coming into force of the Misrepresentation Act 1967, there appears now to be a distinction between negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation is generally confined to cases where a duty is imposed to take care in making statement. Such a duty may arise under a contract, where the parties stand in a fiduciary relationship: *Nocton v. Ashburton* [1994] AC 932 or out of a 'special relationship': Hedley Byrne. Where a special relationship exists, a negligent misstatement may not only be a breach of contractual warranty, but also an actionable tort as a breach of the duty which exists throughout pre-contractual negotiations until making of the final contract. In *Selangor United Rubber Estates Ltd v. Cradock & Ors* [1965] 1 Ch 896 the court held that where a Plaintiff alleged a breach of duty arising from any given relationship, he has to specify with precision the relationship under which the duty arose: in this case it wax not clear whether the Plaintiff was alleging the ordinary relationship of banker and customer or some other special relationship.

[16] Having perused carefully the respondents' statement of claim and applying the foregoing principles to the present case, it is my view that the matters pleaded do not fulfill the requirement for a cause of action founded on negligent misrepresentation. The respondents have not pleaded any special relationship or skills on the part of the appellant which skill could cause them to owe a professional duty of care to the respondents. The matters pleaded do not disclose the necessary requirements for a case of negligent misrepresentation. Looking at the respondents' statement of claim, one cannot make out the description of the special relationship or skills, the duty owed nor the degree of neglect or breach, as a result of which one simply cannot assess damages arising therefrom.

[17] This brings me to the contention of the respondents that they have succeeded in establishing a case of innocent misrepresentation. Then again, where the case is one of innocent misrepresentation, the respondents may not recover damages. As Gopal Sri Ram JCA said at pp 240-241 in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar*:

> In the case of innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in the country. A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages. This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Court of Common Law will grant.
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> There is a world of difference between the two remedies, namely, an indemnity, or more appropriately, restitution (see Goff & Fones, *The Law of Restitution* 93th ED) at p. 287, fn 48) and an award of damages for misrepresentation.

[18] That is the principle applicable here. And, it is for that reason the respondents are not entitled to an award of RM200,000 as ordered by the learned sessions judge.

[19] Therefore, for all these reasons, the appellant's appeal is allowed with costs.